Rethinking the Fee Simple in Rural America

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Jessica A. Shoemaker, Fee Simple Failures: Rural Landscapes and Race, 119 **Mich. L. Rev.** 1695 (2021).

Newly released census data reveals that our rural places continue to shrink. The recent Intergovernmental Panel on Climate Change (IPCC) report cements that climate change is widespread and intensifying. The pandemic has hit hard in rural places, with outbreaks centered around slaughterhouses, which predominantly employ people of color. At the same time, the country as a whole is reckoning with issues of racial justice.

All of these issues surface in Professor Jessica Shoemaker's latest article, *Fee Simple Failures: Rural Landscapes and Race*. The article examines ways that property law has created and perpetuated serious problems with the rural agricultural land tenure system.

Professor Shoemaker begins with an overview of rural places, focusing on issues of race and wealth. She notes the stark racial landscape of farming: 98 percent of all agricultural land in the U.S. is owned by white people. And while a large majority of the people who live in rural areas are white, the number of people of color who are rural residents has recently increased.

This growth, however, is mostly limited to poorer, segregated pockets often associated with specific employers, such as meat processing plants. Against this backdrop, existing farmers are aging, and a large amount of agricultural land will change hands in the coming years. Thus, we are presented with an opportunity for change.

Shoemaker next explains *why* rural and agricultural landscapes in the US are so predominantly white, with a focus on the ways that the law intentionally designed racial hierarchies in land ownership. Here, she discusses Indigenous land loss in the wake of *Johnson v. McIntosh*; Mexican citizens' land loss in the aftermath of the Treaty of Guadalupe Hidalgo; and Black land loss due in part to the failed promises of redistribution and the Southern Homestead Act.

For example, Black ownership of farmland was at its highest level in 1910, when African Americans owned up to 19 million acres of farmland, by 1997 that number was down 1.5 million acres. In contrast to this loss of land, a large number of mostly white men received land through homesteading. And further west, informal grazing rights that were established mostly by white ranchers have been preserved and privileged through federal grazing management programs.

Having laid out various ways that the U.S. legal system expressly allocated land to white people while excluding people of color, Professor Shoemaker next turns to the choices that American property law has made that have helped to perpetuate and cement white farmland ownership.

Specifically, while the current racial land distribution is due in part to generational wealth transfer, the paper asserts that the fee simple itself functions to maintain early land allocations and racialized exclusion. This is because of a few key features of the fee simple. First, it is perpetual, regardless of whether the owner is actively possessing or using the land. The result is to maximize power and wealth in the earliest owners and their descendants. Second, Shoemaker focuses on the way that people can

profit from the land without investing their labor in it, meaning those lucky enough to have inherited land might have no connection to farming the land, but can still gain and maintain wealth from it.

This attribute of the fee simple has allowed for the concentration of agricultural land ownership, because one need not actually work all the land that they own. These features of fee simples combine to create a land tenure system where approximately 40 percent of agricultural land is rented, and those tenant farmers are disproportionately people of color.

The paper then describes policy choices that have influenced whether people are secure or insecure in their landholdings. For example, agricultural subsidies reinforce the ownership interests of existing owners. Similarly, tax policies encourage land to remain within families through generations, and property laws allow for long-term control of land.

Because these types of policies encourage people to retain their land and pass it on to their heirs rather than sell it on the open market, land remains with its existing, mostly white owners. In contrast, many of our property rules function to dispossess people of color of their land ownership. Specifically, for structural reasons, many minority landowners fail to perfect their title through recording or the use of probate; they often purchase property through installment land contracts; they may own property as co-owners with other heirs; and they are likely to lease farmland through oral, short-term, periodic tenancies. All of this makes it more difficult, if not impossible, to access certain farm assistance programs.

After uncovering these problems as well as their roots, the article considers reforms that might alleviate them. Shoemaker notes that much of the existing property reform scholarship is centered in urban spaces.

Thus, in the last part of the article, she extends this creative thinking to our rural places and sets forth three proposals that get at the issues raised in the paper: we should think about requiring active participation in control of agricultural lands; we should focus on racial equity when considering opportunities for access to farmland; and we should not shy away from property and land tenure reforms more broadly. Here, she discusses solutions like importing the ideas behind the implied warranty of habitability and inclusionary zoning to more rural landscapes, as well as more dramatic forms of land redistribution.

One of the most thought-provoking parts of the article is Shoemaker’s proposal that, in some instances, land ownership should be connected to, and require, use. As she points out, owner-occupancy requirements exist in urban contexts, so why not in the context of rural farmland as well? This also gets at some of the great discussions we have with our 1Ls about the value of the labor theory of property, who it rewards, and why.

Overall, Shoemaker’s article presents an important and prescient issue, and one that is too often overlooked in the property law scholarship. Her proposals are concrete, and they could lead to real change in rural places.

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